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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-706

E. A. McQUADE TOURS, INC.,

Petitioner,

v.

CONSOLIDATED AIR TOUR MANUAL COMMITTEE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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CONSOLIDATED AIR TOUR MANUAL COMMITTEE, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E.A. McQuade Tours, Inc. (McQuade), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on August 21, 1972.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A, *infra*, pp. 1a-22a) is not yet reported. The judgment of the United States District

Court for the Southern District of Florida followed a jury verdict, and was issued without opinion (Appendix B, *infra*, pp. 1b-3b).

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1972 (p. 1a, *infra*), and petition for rehearing and for rehearing en banc was denied on October 10, 1972 (p. 23a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Having found a collective refusal to deal with a deleterious effect upon competition, may the Court of Appeals thereafter inquire into the motive or purpose of the combination acting in restraint to trade, or must it apply the *per se* rule based upon the exlcusionary effect of the restraint of trade?

2. May the Court of Appeals determine questions of fact in a case where the plaintiff has a right to a jury trial–

(a) By reexamining the jury's decision as to the reasonableness of a collective refusal to deal?

(b) By itself determining that a restraint of trade was reasonable, and not arbitrary or discriminatory?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Seventh Amendment to the Constitution of the United States:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of

trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.

The Sherman Act (15 U.S.C. 1 *et seq.*) provides, *inter alia*, as follows:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Sec. 2. Every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

The Clayton Act, Section 4 (15 U.S.C. 15), provides as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

1. Background to the Proceeding

McQuade is engaged in the sale of tour packages at wholesale for Florida, the Caribbean and the Bahamas. Its tour packages are sold through retail travel agents and individual airlines in conjunction with air transportation,

and include hotel accommodations, meals, surface transportation and sightseeing trips. (J.A. 83-92).[1]

The Consolidated Air Tour Manual Committee (CATM) and its member airlines, the respondents herein, publish a consolidated listing of available tour programs (hereinafter referred to as the Manual), under authority granted by the Civil Aeronautics Board (CAB), pursuant to Section 412 of the Federal Aviation Act (49 U.S.C. 1382). The Manual is published twice a year, one issue for the spring/summer/fall (Summer Manual), and one issue for the winter period (Winter Manual), and is divided into several geographic areas, including Alaska, Bermuda, the Bahamas, Florida-Fort Lauderdale, and Florida-Miami Beach. (J.A. 98-99; Pl. Exh. 1; Exhs. 1 and 2 to Amended Complaint). "The record established that inclusion in the Manual is virtually an absolute necessity for success in the tour industry." (*Infra*, p. 12a).

From the inception of CATM, multiple tour operators have represented hotels for all areas other than Florida and Nevada.[2] Prior to the Summer Manual for 1968, CATM allowed each hotel in the Florida section (including Fort Lauderdale and Miami Beach) to be represented in the Manual by only one tour operator (J.A. 585-87, 752-53, 1001-05, 1300-01, 1302-05). Commencing with the 1968 Summer Manual, multiple tour operators have represented Florida hotels in the Manual, but under rules devised by CATM solely for Florida, and which rules are not applied to any other area

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[1] J.A. references are to the joint appendix filed in the Court of Appeals.

[2] Nevada hotels act as their own wholesalers, and are not represented in the Manual by tour operators. Pl. Exh. 1.

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in the Manual (*infra*, p. 7a; J.A. 816-17, 878-81, 1311-15). CATM never submitted its special rules for the Florida section of the Manual to the CAB, and the CAB has never approved these rules.

McQuade had been in business as a tour operator prior to the inception of CATM, and has participated in the Manual since its origin, beginning with a program for several Fort Lauderdale hotels (J.A. 91-94). In 1964, when the Fort Lauderdale Sheraton Hotel was first opened, McQuade represented it, along with other Fort Lauderdale hotels, in the Winter Manual for 1964-1965 (J.A. 104-105). McQuade again submitted a program for the Sheraton for the 1965 Summer Manual, providing rate sheets and a tour operator agreement with the hotel to the Florida area chairman of CATM (J.A. 110-12, 724-26, 1294-96). Another tour operator, American Express Company, submitted a program for the same hotel (J.A. 710). The Sheraton had indicated a desire to appoint more than one tour operator to represent it in the Manual (J.A. 1295). The CATM area chairman, however, treated the dual submission as conflicting representations, based on the CATM rule then allowing only one tour operator to represent each Florida hotel in the Manual, and asked the hotel to make a determination as to which tour operator was to represent the Sheraton in the Manual (J.A. 719, 720, 726-27, 730, 757). Although the hotel did not terminate McQuade's right to continue to represent it in the Manual, it did advise CATM that: "Per your request for information you are authorized to insert American Express in Consolidated Manual" (J.A. 1295, 1298). CATM then excluded McQuade's representation of the Fort Lauderdale Sheraton from the Summer Manual for 1965 (J.A. 1296). This exclusion was not based upon any question of McQuade's fitness or authority to represent the hotel as a

tour operator (J.A. 726-731). The exclusion was not appealable (J.A. 941-47).

In 1967, after CATM had received requests from several tour operators that CATM change its one tour operator per Florida hotel rule, CATM responded that "contrary to popular belief," there was no CATM rule so limiting representation for Florida hotels, and that it was up to the hotels and the tour operators to determine the representation (*infra*, p. 6a; J.A. 117, 812-16, 878). McQuade, which was then offering programs in the Manual for Fort Lauderdale, the Bahamas, and the Caribbean area, assumed that CATM would thereafter accept multiple tour operators for Miami Beach hotels and solicited a number of such hotels to enter into tour operator agreements authorizing McQuade to represent them as a tour operator (J.A. 118-122). Eleven Miami Beach hotels entered such agreements, conferring upon McQuade the status of "officially approved wholesaler subject to all rights, privileges, and commission structure extended to any and all other tour operators as recognized by Hotel." (J.A. 1362-72). The management of seven other hotels amended the agreement to specifically preclude McQuade from representing these properties in the Manual (J.A. 121-22, 1307).

CATM, realizing that there would be multiple representations submitted by tour operators for Florida for the next Manual, called an airline meeting to devise new rules to cover only the Florida situation (*infra*, pp. 7a; J.A. 816-17, 878-81, 1311-12). Those at the meeting agreed to certain rules, which were approved by CATM by a mail vote letter.[3] Thereafter, the Florida and

[3] The rules agreed to provided, *inter alia:*

(2) The Tour Operator must provide written authority from the individual hotels whom he wishes to represent in the CATM.

chairman of CATM prepared a letter to be sent to all interested airlines, tour operators, and hotels, spelling out the "rules of the road" to be used for the Florida section of CATM.[4]

McQuade submitted its Miami Beach program to CATM, including the eleven tour operator agreements authorizing petitioner to represent the hotels as a tour operator, but without specifically certifying that it was authorized to represent them in the Manual (J.A. 1262-72). McQuade received a notification from CATM that its Miami Beach program had been accepted at about the same time that it received like notifications regarding its Fort Lauderdale, Bahamas, and Caribbean programs (J.A. 144-46, 260, 1395). McQuade was later requested by the Florida chairman of CATM to submit express certifications of authority from each hotel to represent

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(3) The Tour Operator must provide the hotels' standard tour rate sheets in support of his program.

See, J.A. 881, 1311-1325, Pl. Exh. 19. Prior to that time CATM had never required written authorization from hotels in Florida or any other area, but had required rate sheets in all areas. J.A. 126-131.

[4]The "rules of the road" provided, *inter alia*:

2. The tour operator must provide written authority from each hotel/motel certifying that he is authorized to represent that hotel/motel in the Florida Section of the CATM.

* * * * *

4. The rates submitted by multiple tour operators for the same hotel/motel must be standard for all operators in the basic seven night program.

See, J.A. 881-883, 1313-15. The requirement that rates be "standard" has never been applied to other areas in the Manual, nor have such authorizations been required in any other area. J.A. 126-131.

them in the Manual and, failing to do so, its Miami Beach program was excluded from the Summer Manual for 1968. (J.A. 148-59, 908-09, 941-42). There is no appeal from a CATM decision to exclude a program (J.A. 941-47).

The decision to exclude the Miami Beach program was based solely on the failure of the tour operator agreements to provide "specific mention of the Consolidated Manual for the summer of '68", and not because of any question of McQuade's authority or ability to represent these hotels. (J.A. 953-54).

2. Proceedings at the District Court

McQuade filed the instant action at the District Court, pursuant to Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2), and Section 4 of the Clayton Act (15 U.S.C. 15), based upon the unlawful exclusion of its program from the 1965 and 1968 Manuals, and demanded a jury trial.

In its instructions to the jury, the District Court stated:

> If you find from a preponderance of the evidence that the rules adopted by the defendants were unnecessary, you must find for the plaintiff.
>
> If you find from a preponderance of the evidence that the rules adopted by the defendants were necessary, but that the rules were applied in an unreasonable or arbitrary manner to the plaintiff's requests for tour program, you must find for the plaintiff.
>
> If you find from a preponderance of the evidence that the rules adopted by the defendants were necessary and that the rules were applied fairly to the plaintiff, then you must find for the defendants. (J.A. 1206-07).

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The "rules" referred to the rule of one tour operator per Florida hotel in effect when the Fort Lauderdale Sheraton program was excluded, and the rules used to exclude petitioner's Miami Beach program (J.A. 1204-06). The question as to whether the rules were "necessary" was based upon CATM's contention that CAB authority to publish a Manual provided the airlines with antitrust immunity for all actions taken in publishing the Manual, pursuant to Section 414 of the Federal Aviation Act (49 U.S.C. 1384). (J.A. 1205-06).

A jury verdict was returned in McQuade's favor, in the amount of $500 for the exclusion of the Fort Lauderdale Sheraton in 1965, and in the amount of $27,000 for the exclusion of the Miami Beach program in 1968. (J.A. 1217-18). Judgment was entered for treble the damages found, plus costs of $2,325.06 and attorney's fees of $47,000, for a total of $131,825.06 (*infra*, pp. 1b-3b).

3. Decision of the Court of Appeals

The Court of Appeals found that the District Court erred in applying the *per se* rule to CATM's collective refusal to deal, holding that the rule of reason should have been employed. The Court noted McQuade's argument that: "A combination of airlines (CATM) controls a resource (listing in the Manual) that is essential to McQuade's ability to compete in the wholesale tour market. The airlines' collective refusal to list him in the Manual has impaired his ability to compete . . .". The Court then stated: "While we agree with McQuade that the airlines collectively refused to deal with it, we do not agree that CATM's conduct is to be governed by the *per se* rule." (*Infra*, p. 16a).

The Court of Appeals held that "the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question." (*Infra*, p. 18a). Ignoring the negative effect of the restraint upon competition, the Court found that there was no evidence of an exclusionary or coercive motive on CATM's part. The Court further found that CATM's rules were not applied to McQuade in a discriminatory fashion. Absent improper motive and discrimination against petitioner, the Court held the *per se* instruction to be erroneous. (*Infra*, pp. 19a-20a).

Stating that "a new trial of this case would be costly and unproductive," the Court went on to consider "whether McQuade's exclusion from the Manual was an unreasonable restraint of trade." (*Infra*, p. 20a). Without considering that the jury may have found, pursuant to the District Court's instructions, that "the rules were applied in an unreasonable or arbitrary manner to the plaintiff's requests for tour program" (J.A. 1206), the Court of Appeals determined that the exclusion of its programs from the Manual was not an unreasonable restraint of trade. Reexamining the facts, the Court specifically found that the rules were not applied to McQuade "arbitrarily or discriminatorily" and, holding that "the facts in this case do not present a violation of the Sherman Act by CATM", the Court reversed with directions to dismiss. (*Infra*, pp. 20a-22a).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals rejecting the *per se* rule, after finding a collective refusal to deal which adversely affected competition, is in conflict with the applicable decisions of this Court. *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10

L.Ed.2d 389 (1963), *rehearing denied* 375 U.S. 870; *Radiant Burners v. Peoples Gas L. & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). There is no precedent, in this Court or in any court of appeals, for use of the rule of reason to test such a restraint of trade.

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *certiorari denied* 396 U.S. 1062 (1970), *rehearing denied* 397 U.S. 1003, the case cited by the court below (*infra*, p. 18a), involved suppliers terminating a distributor's exclusive franchise arrangements. The facts disclosed no proof of a combination or conspiracy, and no collective refusal to deal. "The exclusion of plaintiff was merely the incidental result of appellants' agreement to transfer their lines to Portside. In such a case the group boycott cases are not controlling." (416 F.2d at 80). The rule of reason test is properly applied to supplier/exclusive distributor cases,[5] while the *per se* rule is applicable to collective refusals to deal or group boycott cases.[6]

Similarly, the instant proceeding does not fall within the class of cases where members of a trade group or association refused to deal with an applicant for

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[5] *Alpha Distributing Co. v. Jack Daniel Distillery*, 454 F.2d 442, 452 (9th Cir. 1972); and cases cited in *Hawaiian Oke, supra*, 416 F.2d at 76.

[6] *See*, Von Kalinowski, *The Per Se Doctrine–An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. Rev. 569 (1964), and Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847 (1955), cited by the court below (*infra*, p. 19a). It should be noted that Barber's article preceeded this Court's decisions in *Silver*, *Radiant Burners*, and *Klor's*, *supra*.

membership, and where the rule of reason has been employed to test the restraint of trade. *E.g., Deesen v. Professional Golfers Association*, 358 F.2d 165 (9th Cir. 1966), *certiorari denied* 385 U.S. 846 (1966), *rehearing denied* 385 U.S. 1032 (1967); *Gamco, Inc. v. Providence Trust & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952), *certiorari denied* 344 U.S. 817 (1952). McQuade did not seek to join CATM, but to pay the price for and advertise in the Manual, in competition with other tour operators (*infra*, p. 12a).[7]

CATM's collective refusal to deal with McQuade, impairing its ability to compete, is a *per se* violation of the Sherman Act based upon its impact in the marketplace, *i.e.* its pernicious effect on competition. The motives, purpose, and self-interest of CATM do not invoke the rule of reason and thereby immunize these unlawful actions. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967).

The alleged reasonableness in the circumstances involved of the actions taken by CATM in rejecting McQuade's tour programs for the Fort Launderdale Sheraton in 1965 and for Miami Beach in 1968[8] cannot

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[7] If McQuade had been dealing with only one airline, and as the only tour operator in its manual, then that airline's rejection of McQuade's programs in favor of another tour operator would fall within the *Hawaiian Oke* and *Alpha Distributing* rule. (*Supra*, fn. 5)

[8] The Court below improperly ascribed the 1965 rejection to CATM's carelessness without considering the unlawful rule of one tour operator per hotel, and the 1968 exclusion to CATM being overly cautious, but, again, without considering the restraint created by the "rules of the road." (*Infra*, p. 20a)

save these concerted refusals to deal from the application of the *per se* rule. *Klor's v. Broadway-Hale Stores*, 359 U.S. at 212; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, at 466-468, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

Here, as in *Radiant Burners v. Peoples Gas L. & Coke Co., supra*, the petitioner cannot sell its product (tours) because of the concerted refusal of the members of the combination (CATM) to deal with it. The rejection of McQuade's tour programs, and their exclusion from the Manual, therefore falls within a class of restraint which from its nature is unduly restrictive, and forbidden by the Sherman Act as well as the common law. (364 U.S. at 559-560).

Here, as in *Silver v. New York Stock Exchange, supra*, there may not have been a significant anticompetitive motive in the collective refusal to deal, but it nevertheless deprived McQuade of a valuable business service which it needed to compete effectively in its own market. In the absence of protection or justification derived from another statute (here the Federal Aviation Act), the combination's refusal to deal is in violation of the Sherman Act (373 U.S. at 347-349). Moreover, as in *Silver*, there is no right or opportunity to appeal an adverse ruling which results in a restraint of trade. (J.A. 941-47, 373 U.S. at 361-64). The combination "is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violation . . ." *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. at 465.

The reasonableness of the motives or the methods employed by a combination is not relevant where the

result is to exclude a trader from a substantial market in interstate commerce. Such an exclusion is unreasonable *per se*. *Klor's v. Broadway-Hale Stores, supra; Radiant Burners v. Peoples Gas L. & Coke Co., supra; Fashion Originators' Guild v. Federal Trade Commission, supra.*

In *Northern Pacific R. Co. v. United States,* 356 U.S. 1, at 5-6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958), this Court referred to certain "practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned," it also avoids unnecessary and complicated investigations. In this case, the *per se* violation is clear beyond peradventure.

This Court should grant certiorari in order to maintain the certainty of the law as it is applied to collective refusals to deal, and to countermand the confusion and needless speculation which would emanate from the decision of the court below, which improperly interprets and limits applicable decisions of this Court.

2. The decision by the Court of Appeals, which reexamined the facts determined by the jury below, and thereafter made determinations as to the reasonableness of the restraints in trade excluding McQuade's tour programs, violates the Seventh Amendment to the Constitution of the United States and is in conflict with the applicable decisions of this Court.

In an action for damages for restraint of trade under the Sherman Act the plaintiff is entitled to a jury verdict

on all questions of fact. *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 36 S.Ct. 233, 60 L.Ed. 505 (1916); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). In the instant case the jury found for the plaintiff, either on the basis that the airlines' rules were not necessary, and therefore the collective refusal to deal was not provided immunity under the Federal Aviation Act, or that rules were necessary, but "applied in an unreasonable or arbitrary manner to the plaintiff's requests for tour program . . .". (*Supra*, p. 8). The Court of Appeals gave no consideration to the latter alternative, but simply reversed the District Court because of its use of the *per se* rule (*infra*, pp. 13a-22a). Rather than attempt to reconcile the jury's verdict to the instructions by the District Court, as supported by the evidence of record, the Court of Appeals erroneously reexamined and redetermined facts found by the jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), *rehearing denied* 369 U.S. 882, *motion denied* 371 U.S. 803; *Parsons v. Bedford*, 28 U.S. 433, 3 Pet. 433, 7 L.Ed. 732 (1830).

The Court of Appeals further erred in reversing the judgment of the District Court with directions to dismiss the action (*infra*, p. 22a), rather than remanding for a new trial. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1913); *Young v. Central R. Co.*, 232 U.S. 602, 34 S.Ct. 451, 58 L.Ed. 750 (1914).

The Court of Appeals did not reexamine the record to determine if the jury determinations were adequately supported by the facts. *See, Bigelow v. RKO Radio*

Pictures, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). To the contrary, the Court of Appeals made its own determinations as to the reasonableness of CATM's restraints of trade, and whether CATM's actions were arbitrary or discriminatory against McQuade (*infra*, pp. 20a-22a). Clearly, questions of reasonableness are issues of fact to be decided by a jury, and not by an appellate court.

Moreover, the Court of Appeals did not hold that there was no basis on which the jury could have found that the rules had been unreasonably applied to McQuade. As to the 1965 Manual, the Court found that the telegram of the Fort Lauderdale Sheraton, "while ambiguous, could nevertheless reasonably be interpreted" as a desire to eliminate McQuade (*infra*, p. 20a). Could not such an "ambiguous" statement as reasonably be interpreted as indicating a desire to have more than one tour operator in the Manual? (J.A. 1295). Similarly, with regard to the 1968 Manual, the Court below concluded that "the rules were reasonable on their face" (*infra*, p. 21a), but without distinguishing between the rules adopted by CATM mail vote letter and the "rules of the road" (*supra*, p. 6-7), and without ever considering if such special rules limited to Florida were themselves reasonably necessary since no like rules were required in any other area covered by the Manual. (*Infra*, p. 4a). The Court below, without discussion of the substantial evidence to the contrary,[9] opined that the rules were not applied to

[9]For example, CATM had sent telegrams to eight tour operator competitors of McQuade on February 1 and 2, 1968, confirming telephone conversations with each of them, requiring submission of their authorizations by February 2nd, but such authorizations were received and accepted after February 9th. No such telegram was sent to McQuade. However, a telegram was received by McQuade

McQuade "arbitrarily or discriminatorily" (*infra*, p. 21a), and that McQuade's tour operator agreement "cannot reasonably be construed" as giving it the right to represent the contracting hotels in the Manual (*infra*, p. 22a). Finally, the reasonableness of excluding McQuade's Miami Beach program solely because its authorizations did not provide "specific mention of the Consolidated Manual for the summer of '68", and not because of any question or doubt as to McQuade's authority to represent these Miami Beach hotels, was never considered by the Court of Appeals. (J.A. 953-54).

In sum, there is substantial evidence of record which disputes each of the Court of Appeal's findings of fact, and such evidence is sufficient to sustain directly opposite findings by a jury. *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946). Assuming that the jury had found, pursuant to the instructions, that the rules were "applied in an unreasonable or arbitrary manner" to McQuade's programs, the Court of Appeals erroneously reexamined and redetermined the facts in reversing the judgment below. If, however, the jury had not reached the question of reasonableness, the Court of Appeals nonetheless erred by supplanting its determination of questions of fact for that assigned to the jury by the Seventh Amendment.

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after business hours on Thursday, February 15th, requiring submission of new authorizations no later than February 19th, and its program was excluded from the Manual on February 16 or 19, 1968 (J.A. 155-57, 896, 908-09, 925-34, 1383-85, 1396-1401); the management of seven Miami Beach hotels construed the tour operator agreements as giving authority to represent the hotels in the Manual, and amended its agreement to specifically preclude such representation (J.A. 1307).

Certiorari should be granted to allay the violence the court below has wrought upon petitioner's Seventh Amendment rights in conflict with this Court's decisions.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2457

E. A. McQUADE TOURS, INC.,
Plaintiff-Appellee-
Cross Appellant,

versus

CONSOLIDATED AIR TOUR MANUAL COMMITTEE, ET AL.,
Defendants-Appellants-
Cross Appellees.

Appeals from the United States District Court for the Southern District of Florida

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(August 21, 1972)

Before PHILLIPS,* THORNBERRY and RONEY, Circuit Judges.

THORNBERRY, Circuit Judge: This is an appeal from a judgment of the district court entered on May 10, 1971, pursuant to a jury finding that the Consolidated Air Tour Manual Committee (CATM) and its mem-

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*Hon. Orie L. Phillips, Of the Tenth Circuit, sitting by designation.

ber airlines had engaged in unlawful restraints of trade. As a result of that finding, E. A McQuade Tours, Incorporated (McQuade), was awarded three-fold the damages found by the jury, plus costs and attorney's fees, in the sum of $131,825.06. Both parties have appealed on numerous grounds. The facts are important to our disposition of this appeal, so we must state them in some detail.

McQuade is engaged in the business of wholesaling tour packages in Florida, the Caribbean, and the Bahamas. Its tour packages are sold through retail travel agents and the defendant airlines in conjunction with air transportation, and include hotel accommodations, meals, surface transportation, and sightseeing trips. CATM, a committee composed of representatives of the member air carriers, publishes a consolidated listing of available tour programs (hereinafter referred to as the Manual) under authority granted by the Civil Aeronautics Board (CAB), pursuant to Section 412 of the Federal Aviation Act, 49 U.S.C. § 1382.[1] CATM's refus-

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[1]The statute provides, in pertinent part:

> (a) Every air carrier shall file with the Board a true copy . . . of every contract or agreement . . . affecting air transportation . . . between such air carrier and any other air carrier . . . for pooling or apportioning earnings . . ., or relating to the establishment of transportation rates . . ., or for preserving and improving safety, economy, and efficiency, of operation, or for controlling . . . destructive competition, or for regulating stops . . ., or for other cooperative working arrangements.
>
> (b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public

al, on two occasions, to list McQuade tours in the Manual is at the heart of this dispute.

CATM was formed for the express purpose of consolidating into one manual a listing of air tour programs available through tour operators. The Committee functions through a general chairman, area chairmen, and the carrier representatives who transact CATM business at periodic meetings. All programs which a tour wholesaler (operator) desires to be included in the Manual are submitted to the appropriate area chairman and are approved or disapproved by the Committee. The Manual is published twice annually, one issue covering the eight-month spring/summer/fall period (Summer Manual) and one issue covering the four-month winter period (Winter Manual), and is divided into several geographic areas — e.g., Alaska, Bermuda, Puerto Rico, Fort Lauderdale, and Miami.

When a customer, desiring to purchase an air tour, contacts a retail travel agent, the agent often selects a suitable tour from the Manual and either (1) contacts the air carrier over whose route the transportation will be sold, who in turn requests booking from the tour operator offering the program in the Manual, or (2) contacts the tour operator directly and requests booking. The tour operator's agreement with the hotels generally specifies that the tour operator will receive a fifteen percent commission on the hotel accommoda-

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interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act . . . .

tions sold through the operator. The retail travel agent involved receives two-thirds of the operator's commission. If the customer bypasses the retail travel agent and goes instead directly to the airlines, the process remains unchanged except that the tour operator retains the full fifteen percent commission.

Prior to publication of the Summer Manual of 1968, hotels in the Florida area, including those in Fort Lauderdale and Miami, had always been represented in the Manual on the basis of only one tour operator for each hotel. Since its inception, CATM has listed multiple tour operators as representatives for the individual hotels in all other areas except Nevada.[2] CATM contends that the Florida practice arose many years prior to CATM's formation and represented a policy of the hotels and tour operators in that area in which it had no authority or interest. It is fairly clear, however, that CATM by its attitude and procedures perpetuated the practice to the extent that many in the tour business came to look upon the historic one tour operator per hotel relationship in Florida as a CATM rule.[3] Prior to 1968, a tour operator's presentation of a program and the room rates for a hotel was accepted by CATM as evidence of authority from a Florida hotel for the operator to represent that hotel in the Manual, and no specific evidence of authority was required.

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[2]Nevada hotels act as their own wholesalers and are not represented in the Manual by tour operators.

[3]Brief for Cross-Appellant at 11.

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McQuade had been in business as a tour operator prior to CATM's first publication and has participated in the Manual since its origin. As of the time of trial, McQuade had submitted over 2,000 tour programs for publication in the Manual. All but the twelve programs involved in the instant case were approved by CATM and published.

CATM first refused to publish a McQuade program in 1965. In 1964, after the Fort Lauderdale Sheraton Hotel was first opened, McQuade had represented it, along with other hotels in the area, in the 1964-65 Winter Manual. In early 1965, McQuade again submitted a program for the Sheraton for the 1965 Summer Manual, providing rate sheets and a tour operator agreement with the hotel to the Florida area chairman of CATM. Simultaneously, American Express, another tour operator, submitted a program for the same hotel. There was some indication at the time that the Sheraton desired to appoint several tour operators as its representatives in the Manual. The CATM area chairman, however, treated the dual submission as a conflicting representation and asked the Sheraton to clarify which tour operator was to represent it in the Manual. In an ambiguous reply, the hotel advised CATM that it was "authorized to insert American Express in Consolidated Manual." The area chairman interpreted this as an instruction to exclude McQuade, and accordingly rejected McQuade's submission.

The second instance of CATM's refusal to publish McQuade tours occurred roughly three years later. In 1967, CATM received requests from many tour opera-

tors that multiple tour operators be allowed to represent individual hotels in Florida. CATM responded by advising all parties concerned that, contrary to popular belief, there was no CATM policy or rule limiting Florida hotels to representation by one tour operator and that it was up to the hotels and the operators to determine their representative status. McQuade never before having submitted programs for Miami Beach and assuming that the Manual would thereafter provide multiple tour operator listings, solicited a number of hotels in Miami Beach to enter contracts authorizing McQuade to represent them as a tour operator. The contracts conferred upon McQuade the status of "officially approved wholesaler subject to all rights, privileges, and commission structure extended to any and all other tour operators so recognized by Hotel." Seven of the hotels contacted amended the authorization contract specifically to prohibit McQuade from representing them in the Manual. Eleven hotels entered into the contracts without alteration in the latter part of 1967.

The Committee in 1967, anticipating multiple tour operator submissions for some Florida hotels in the upcoming Manual, devised new rules to govern the operators' requests for listing in the Manual. These socalled "rules of the road" required, among other things, each tour operator to provide written authority from each hotel or motel expressly certifying that he was authorized to represent it in the Florida Manual. After these rules had been approved by a majority of the members of the Committee, the Florida area chairman sent copies and explanations of the rules to

member airlines, hotels, and tour operators who had expressed a desire to participate in the Manual. By their terms the rules of the road were clearly limited in application to the Florida section of the Manual and were never applied to any other section.

Although subsequent events are in much dispute, the following facts seem clear. McQuade submitted its tour programs for the eleven Miami Beach hotels, as well as the contracts he had earlier completed with them. The Committee accepted McQuade's programs, along with Miami Beach programs submitted by eight other operators, on the condition that the operators furnish express written authorization to represent the hotels in the Manual. The other eight operators furnished the requested proof of authorization. McQuade did not, and was ultimately excluded from the Miami section of the Manual by reason of his failure to furnish the specific authorization required by the rules of the road.

McQuade filed the instant action in the court below contending that it was entitled to treble damages pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1, 2,[4] and Section 4 of the Clayton Act, 15

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[4]Section 1 of the Sherman Act provides in part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal . . . .

Section 2 of that Act declares:

> Every person, who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with

U.S.C.A. § 15,[a] for CATM's improper exclusion of its programs from the 1965 and 1968 Manuals. After a jury verdict was returned in McQuade's favor in the amount of $27,500, judgment was entered for treble that amount, plus costs of $2,325.06 and attorney's fees of $47,000, for a total of $131,825.06.

I.

Among the numerous grounds for reversal asserted by CATM, it argues that McQuade lacked standing to bring this suit. To have standing to sue under Section 4 of the Clayton Act, plaintiff must prove injury to his business or property resulting from defendant's conduct. *E.g., Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47 (1922); *Martin v. Phillips Petroleum Co.*, 5th Cir. 1966, 365 F.2d 629, *cert. denied*, 385 U.S. 990, 87 S.Ct. 600. The injury referred to implies the violation of some legal right vested in the plaintiff. *E.g., Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.*, 5th Cir. 1954, 214 F.2d 413.

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foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[a]Section 4 of the Clayton Act is as follows:

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

CATM contends that McQuade has no such status as an injured party because this suit is based on a non-existent right to represent certain hotels in the Manual. CATM thus focuses our attention on the construction of the contracts between McQuade and the subject hotels. The record indicates that in 1965, McQuade held a contract with the Fort Lauderdale Sheraton for exclusive rights to representation in the Manual. American Express, however, held the same "exclusive" right, a situation giving rise to the Sheraton's ambiguous directive to "insert American Express in Consolidated Manual." In 1968, McQuade held contracts with eleven Miami Beach hotels for representation as a wholesale tour operator subject to the rights of other tour operators. It was established that, at the time, two of these eleven hotels were bound by a prior agreement of exclusive representation in the Manual with another tour operator. The contracts submitted by McQuade to the Miami Beach hotels were accompanied by a letter which read as follows:

> I would bring to your attention that this contract and proposed arrangement intends in no way to supersede, nullify or alter in any way any existing arrangements or contracts currently existing between your motel and any other tour operator or operators, but is proposed for the sole purpose of enabling our company to merchandise and promote package tour sales for you through the retail travel trade.

As the quoted passage reveals, no right of representation in the Manual was referred to in McQuade's letters. Moreover, its tour operator agreements with the eleven hotels were silent concerning his right to represent them in the Manual, and management personnel of each of the hotels testified that the contracts with McQuade were in no sense intended to grant it such rights. CATM argues that these surrounding circumstances indicate clearly that McQuade had no contract right to represent the hotels in the Manual.

McQuade urges us to construe the contracts on their face, without regard to the circumstances, and in effect claims that its actual authority to represent the hotels in the Manual was of no concern to CATM, whose only legitimate interest was in ensuring that McQuade was an approved wholesaler. We find, however, that McQuade had a property right in its contracts with the subject hotels, even assuming that they gave it rights only as an approved wholesaler. Even if it had no right to represent the hotels in the Manual, it nonetheless had the right to conduct tours through the hotels on a profitable basis. There is little doubt that this right was made virtually worthless by CATM's refusal to include the tours in the Manual. This court has held that a valid contract is property within the meaning of Section 4 of the Clayton Act. *North Texas Producers Assoc. v. Young*, 5th Cir. 1962, 308 F.2d 235, cert. denied, 372 U.S. 929, 83 S.Ct. 894 (1963). One who alleges impairment of rights under such a contract thus establishes the requisite "injury to property."

In so holding, we recognize that *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.*, 5th Cir. 1954, 214 F.2d 413, arguably might be taken to mean that the proper focus is McQuade's supposed right vis-a-vis CATM to represent the hotels in the Manual, not its rights to conduct tours through the hotels. The alleged restraint of trade in *Okefenokee* resulted from the joint efforts of two power companies in preventing the Florida State Road Department from granting plaintiff, a competitor of the two companies, a permit to build a new line. In affirming the district court's dismissal of the suit, this court reasoned that, because plaintiff had no right to build its line over the proposed route without prior approval of the Road Department, denial of the permit did not impair a right vested in the plaintiff. Following this reasoning, one might argue that, if McQuade had no right to a listing in the Manual, then CATM's refusal to list it does not meet the "legal injury" test. We believe, however, that *Okefenokee* should be limited to its precise facts. First, there was no indication that plaintiff in that case had third-party contract rights that were impaired by the alleged antitrust violation. Here, of course, the value of McQuade's contracts with the hotels was greatly diminished by CATM's excluding its programs from the Manual. Secondly, the alleged violation in *Okenfenokee* arose from action by a governmental agency, the Road Department, and from efforts by two public utilities to influence that agency. *Okefenokee* is thus more closely akin to cases involving the notion of "valid governmental action," *see Woods Exploration & Producing Co. v. Aluminum Co.*

of America, 5th Cir. 1971, 438 F.2d 1286, *cert. denied*, 404 U.S. 871, 92 S.Ct. 701 (1972), than to cases examining the requirement of legal injury in a context of private action. Accordingly, we decline to apply *Okefenokee* to the facts of this case, and conclude that injury to McQuade's contract rights with the hotels is sufficient to confer upon McQuade standing to sue under Section 4 of the Clayton Act.

Moreover, even assuming that CATM's contention with regard to the contracts with the hotels were to be accepted, we would nevertheless be compelled to allow McQuade to continue. Section 4 is phrased in the disjunctive; an injury to either business *or* property will suffice, and McQuade has clearly shown the former. In most cases finding such injury, plaintiff was directly engaged in the sale of products or services in the line of commerce restrained. *See, e.g., Waldron v. British Petroleum Co., Ltd.*, S.D.N.Y. 1964, 231 F.Supp. 72. In the instant case McQuade was in business as a tour operator at all pertinent times. The record establishes that inclusion in the Manual is virtually an absolute necessity for success in the tour industry. It thus cannot be questioned that CATM's excluding McQuade injured it in its business. CATM would contend that it had no choice but to exclude McQuade because it did not have authority from the hotels to be included in the Manual. This argument, however, goes not to whether McQuade has standing to sue, but rather to whether CATM violated the antitrust laws, *i.e.*, whether its conduct constituted an unreasonable restraint of trade. We find, therefore, that McQuade was clearly injured in its business or proper-

ty by CATM's rejection of his tour programs in both 1965 and 1968 and thus has standing to assert whatever rights it might have under the antitrust laws.

II.

This brings us to the most significant issue in the case — whether, and to what extent, McQuade has any rights under the antitrust laws. With regard to McQuade's claim that CATM's refusal to list its tours in the 1965 and 1968 Manual resulted from a "contract, combination, or conspiracy in restraint of trade," the trial court instructed the jury as follows:

> If you find from a preponderance of the evidence that the rules adopted by the defendants were unnecessary, you must find for the plaintiff.[6]

Inquiry into the "necessity" of the rules was prompted by CATM's argument that the Civil Aeronautics Board had approved publication of the Manual and that all rules necessary to accomplish that end were accordingly immune to antitrust prohibitions under Section 414 of the Federal Aviation Act, 49 U.S.C.A. § 1384.[7] By

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[6] R. 1206.

This instruction refers to McQuade's claim under Section 1. Aside from a brief reference to the Section 2 claim, the trial court did not clearly instruct the jury as to McQuade's contention that CATM's excluding its tours was monopolization or an attempt to monopolize. The party's briefs do not touch on the Section 2 claim as such.

[7] This statute provides that

> [a]ny person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "anti-

means of the quoted instruction, the trial court in effect told the jury that, if CATM's conduct was not clad in antitrust immunity, then McQuade's exclusion would be illegal *per se*, without regard to the reasonableness of CATM's standards or of their application to McQuade.* CATM contends that the trial court erred in failing to apply the rule of reason, thus erroneously preventing the jury from considering whether CATM's standards for accepting tour programs, and the enforcement of those standards against McQuade, were a reasonable means of accomplishing the joint, economically productive effort of publishing a reliable manual.

The fundamental principle for determining the legality of conduct under the Sherman Act was announced in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502 (1911), where the Court held that Section 1 reached only "undue" or "unreasonable" restraints. This so-called "rule of reason" was later explained by Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244 (1918).

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trust laws," . . . insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

Owing to our disposition of this appeal, we do not reach the issue of antitrust immunity. Nor do we reach a second contention by CATM, that McQuade's claims fall within the primary jurisdiction of the Civil Aeronautics Board.

*Our interpretation of the quoted instruction is buttressed by the following remark made by the trial judge during preparation of the charge:

[M]y ruling is that if these rules were not necessary, that as a matter of law this would be a violation of the federal statutes.

R. 1112.

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

This Circuit is likewise firmly committed to the rule of reason. *E.g., Harrison v. Prather*, 5th Cir. 1970, 435 F.2d 1168, *cert. denied*, 404 U.S. 829, 92 S.Ct. 67 (1971); *North Texas Producers Assoc. v. Young*, 5th Cir. 1962, 308 F.2d 235, 240, *cert. denied*, 372 U.S. 929, 83 S.Ct. 874 (1963).

There is, however, a well-defined exception to this general principle. Certain arrangements are conclusively presumed to be unreasonable restraints of trade, simply by virtue of their obvious and necessary effect on competition. *See Northern Pacific Ry. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, (1958). Once the existence of such an arrangement has been established, no evidence of actual public injury is required, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365 (1961), and no evidence of the reasonableness of defendant's conduct will be considered in justification. *See Northern Pacific, supra.* This rule of *per se* illegality has been applied thus far to horizontal and vertical price fixing agreements,[9]

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[9]Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376 (1911) (vertical); United States v. Socony Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940) (horizontal).

division of markets between competitors,[10] tying arrangements,[11] and certain collective refusals to deal, or "group boycotts."[12]

McQuade would have us characterize CATM's exclusion of its tour as a group boycott to which the *per se* rule was properly applied. McQuade's argument is deceptively simple: A combination of airlines (CATM) controls a resource (listing in the Manual) that is essential to McQuade's ability to compete in the wholesale tour market. The airlines' collective refusal to list him in the Manual has impaired his ability to compete, and thus is a *per se* violation of the Sherman Act. While we agree with McQuade that the airlines collectively refused to deal with it, we do not agree that CATM's conduct is to be governed by the *per se* rule.

Cases applying *per se* illegality to collective refusals to deal fall into roughly three categories. The first group, exemplified by *Eastern States Retail Lumber Dealers Assoc. v. United States*, 234 U.S. 600, 34 S.Ct. 951 (1914), have involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. Thus, in *Eastern States*, a combination of retail lumber dealers black-listed lumber wholesalers who sold directly to the retailers' customers. The obvious

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[10]Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S.Ct. 971 (1951).

[11]Northern Pacific Ry. v. United States, 356 U.S. 1, 78 S.Ct. 514 (1958).

[12]Fashion Originators Guild of America v. Federal Trade Comm'n, 312 U.S. 457, 61 S.Ct. 703 (1941).

purpose of the combination — eliminating competition from the wholesalers — placed it "within the prohibited class of undue and unreasonable restraints." 234 U.S. at 612, 34 S.Ct. at 954. To the same effect are *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945); *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246 (1963); and *Thill Securities Corp. v. New York Stock Exchange*, 7th Cir. 1970, 433 F.2d 264, *cert. denied*, 401 U.S. 994, S.Ct. 1232 (1971).

Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705 (1959), illustrates a second category of group boycott cases, involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination. For example, in *Klor's*, a large appliance dealer, Broadway-Hale, used its purchasing power to induce defendant manufacturers and wholesalers to sell only at discriminatory prices to plaintiff, a competing appliance dealer. Since the effect of the agreement was to drive Klor's out of competition with Broadway, the Court found the three-cornered agreement illegal *per se*, notwithstanding the fact that the manufacturers and wholesalers, not in competition with Klor's probably had no such anti-competitive motive. *See also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365 (1961); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 5th Cir. 1966, 365 F.2d 478.

Unlike these first two categories, the third group of cases has concerned combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors.

The leading case in the area is *Fashion Originators Guild of America v. Federal Trade Comm'n*, 312 U.S. 457, 61 S.Ct. 703 (1941), in which a group of "original" designers refused to sell their creations to retailers who purchased and sold copies of the original designs. In holding this refusal to deal illegal *per se*, the Court declared that even though the object of the boycott was to prevent the retailers from dealing with manufacturers of the copies and thereby eliminate "style piracy," the coercion practiced indirectly on a rival method of competition precluded application of the rule of reason. *See also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259 (1951) (liquor manufacturers' collective refusal to sell to price-cutting wholesalers).

In all of these cases, the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as "naked restraints of trade," and have fallen victim to the *per se rule*. On the other hand, where these elements have been missing, the *per se* rule has not been applied to collective refusals to deal. *See, e.g., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 9th Cir. 1969, 416 F.2d 71, *cert. denied* 396 U.S. 1062, 90 S.Ct. 752 (1970), holding that a concerted refusal by two manufacturers to renew plaintiff's exclusive sales rights was not *per se* illegal because the refusal was motivated solely by the manufacturers' concern for the integrity of their distribution systems. We conclude that resort to the *per se* rule is justified only when the presence of exclusionary

or coercive conduct warrants the view that the arrangement in question is a "naked restraint of trade." Absent these factors, the rule of reason must be followed in determining the legality of the arrangement. *See* Von Kalinowski, The *Per Se* Doctrine — An Emerging Philosophy of Antitrust Law, 11 U.S.C.A. L. Rev. 569 (1964); Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 47 (1955).

The proper inquiry in the case at hand is therefore whether CATM's refusal to list McQuade tours in the Manual displays the exclusionary or coercive element necessary for invoking the *per se* rule. The record is barren of any such indication. First, McQuade neither alleged nor proved that CATM's conduct was motivated by a desire to exclude McQuade from the wholesale tour market; indeed, it is difficult to imagine such a motive on CATM's part, because neither CATM nor its member airlines are in direct competition with McQuade in the wholesale tour market, and no proof was offered to indicate that CATM or the airlines were monopolizing or attempting to monopolize that market. Nor is there the slightest hint that the refusal to list McQuade tours was an attempt to somehow influence McQuade's business practices and thereby achieve some anticompetitive goal of CATM.

Secondly, there is no suggestion anywhere in the record that CATM combined or conspired with McQuade's natural competitive enemies, the other tour operators, to deprive McQuade of a vital listing in the Manual. Finally, there is nothing to suggest that CATM applied its standards to McQuade in a discriminatory

fashion. At most, the record supports the inference that CATM was careless in failing to request a clarification of the ambiguous 1965 Sheraton directive, and was overly cautious in its interpretation of McQuade's Miami Beach contracts in 1968. In sum, we believe that the *per se* rule is not applicable to the case at hand.

The trial court's *per se* instruction was therefore erroneous. We believe that a new trial of this case would be costly and unproductive. Thus we consider whether McQuade's exclusion from the Manual was an unreasonable restraint of trade. We have already suggested that CATM's rejection of McQuade's program for the Fort Lauderdale Sheraton in 1965 was reasonable under the circumstances. Faced with apparently conflicting submissions for the hotel, the area chairman sought instructions from the Sheraton. The reply he received, while ambiguous, could nevertheless reasonably be interpreted as a statement that the Sheraton did not desire McQuade to represent it in the Manual. All the evidence points to the conclusion that CATM would have accepted either McQuade or American Express, leaving the choice entirely up to the Sheraton. As to the 1965 incident, therefore, any injury that McQuade might have suffered was attributable to the Sheraton, not CATM.

As to the 1968 incident, the adoption and enforcement of the rules of the road must be viewed in light of the pre-1968 custom of limiting representation of a hotel to one tour operator. Regardless of whether this limitation was a CATM policy or whether it was simply

a historical practice of the tour business, CATM in 1967 declared a policy of multiple listings, for each hotel. This decision called for the adoption of standards to govern submissions of tour programs. There was testimony at trial that the airlines believed that they impliedly warranted the responsibility and fiscal integrity of operators listed in the Manual. Moreover, there was undisputed evidence that responsible tour operators would not seek listing in the Manual without some assurance that other operators listed were themselves responsible; and failure to attract responsible operators would have doomed efforts to publish the Manual. Finally, since several operators would be submitting programs for the same hotel, considerations of administrative convenience required proof that the operators were in fact authorized to represent a hotel in the Manual.

These interests all represent legitimate business objectives of CATM. There is not the slightest suggestion that the rules of the road were meant to serve any but the objectives stated. Moreover, there is undisputed evidence that the rules could be complied with easily and quickly. We conclude that the rules were reasonable on their face.

Nor were the rules applied to McQuade arbitrarily or discriminatorily. All interested tour operators, including McQuade, were on notice of the rules. The Miami Beach programs of eight other operators were accepted, just as McQuade's were, on the condition that they provide proof of authority from the hotels. The other operators furnished express authorization;

McQuade did not, choosing to rely on its tour operator agreement, which cannot reasonably be construed as giving McQuade the right to represent the hotels in the Manual.

Thus, we hold that the facts in this case do not present a violation of the Sherman Act by CATM. Accordingly, the judgment of the district court is REVERSED with directions to dismiss.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2457

E. A. McQUADE TOURS, INC.,
Plaintiff-Appellee-
Cross Appellant,

versus

CONSOLIDATED AIR TOUR MANUAL COMMITTEE, ET AL.,
Defendants-Appellants-
Cross Appellees.

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Aug. 21, 1972, 5 Cir., 1972, ____ F.2d ____).

(October 10, 1972)

Before PHILLIPS,* THORNBERRY and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

***Hon. Orie L. Phillips, Of the Tenth Circuit, sitting by designation.**

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

E.A. McQUADE TOURS, INC.
Plaintiff,

v.

Case No. 68-609-CIV-PF

CONSOLIDATED AIR TOUR MANUAL COMMITTEE, *et. al.*,
Defendant

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Peter T. Fay, District Judge, presiding; and

The jury having returned a verdict for the plaintiff on March 17, 1971, assessing damages against all defendants in the amount of Twenty-Seven Thousand Dollars ($27,000.00) for their unlawful restraint of trade in 1968, and assessing damages against the Consolidated Air Tour Manual Committee, Air Canada, Inc., Braniff Airways, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Northeast Airlines, Inc., Northwest Airlines, Inc., Trans Caribbean Airways, Trans World Airlines, Inc., United Air Lines, Inc., and Western Air Lines, Inc., in the amount of Five Hundred Dollars ($500.00) for their unlawful restraint of trade in 1965; and

This Court having denied, on April 19, 1971, defendants' Alternative Motion for Judgment Notwithstanding the Verdict or for a New Trial, and having also denied, on April 19, 1971, plaintiff's Motion for Additur Pursuant to Rule 59; and

This Court having found that plaintiff should recover threefold the damages it sustained, its cost of suit in the amount of Twenty-Three Hundred Twenty-Five and 06/100 Dollars ($2,325.06), and a reasonable attorney's fee in the amount of Forty-Seven Thousand Dollars ($47,000.00);

It is ORDERED, ADJUDGED AND DECREED:

1. That judgment be and it hereby is entered for the plaintiff, and that the plaintiff, E.A. McQuade Tours, Inc., recover of the defendants, Consolidated Air Tour Manual Committee, National Airlines, Inc., Braniff Airways, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Northeast Airlines, Inc., United Air Lines, Inc., Southern Airways, Inc., Trans Caribbean Airways, Inc., Northwest Airlines, Inc., Air Canada, Inc., Alaska Airlines, Inc., American Airlines, Inc., Bonanza Airlines, Inc., Canadian Pacific Airlines, Ltd., Continental Air Lines, Inc., Frontier Airlines, Inc., Mohawk Airlines, Inc., Western Airlines, Inc., Pacific Airlines, Inc., Pacific Airlines, Inc., and Trans World Airlines, Inc., jointly and severally, threefold the Twenty-Seven Thousand Dollars ($27,000.00) of damages, or Eighty-One Thousand Dollars ($81,000.00), plus Twenty-Three Hundred Twenty-Five and 06/100 Dollars ($2,325.06) of costs, plus Forty-Seven Thousand Dollars ($47,000.00) as attorney's fee, for the sum of One Hundred Thirty Thousand Three Hundred Twenty-Five and 06/100 Dollars ($130,325.06), with interest thereon at the rate of six percent as provided by law.

2. That judgment be and it hereby is entered for the plaintiff, and that the plaintiff, E.A. McQuade Tours, Inc., recover of the defendants, Consolidated Air Tour Manual Committee, Air Canada, Inc., Braniff Airways, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Northeast Airlines, Inc., Northwest Airlines, Inc., Trans Caribbean Airways, Inc., Trans World Airlines, Inc., United Air Lines, Inc., and Western Air Lines, Inc., jointly and severally, threefold the Five Hundred Dollars ($500.00) of damages, or the sum of Fifteen Hundred Dollars ($1,500.00), with interest thereon at the rate of six percent as provided by law.

Dated at Miami, Florida, this 10th day of May, 1971.

/s/ Peter T. Fay
PETER T. FAY
District Judge

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-706

E. A. McQUADE TOURS, INC.,

Petitioner,

v.

CONSOLIDATED AIR TOUR MANUAL COMMITTEE *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-706

E. A. MCQUADE TOURS, INC.,

Petitioner,

v.

CONSOLIDATED AIR TOUR MANUAL COMMITTEE *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

1. Whether the decision of the Court of Appeals, applying the rule of reason to the fully-developed record and determining that CATM may adopt and enforce on a non-discriminatory basis reasonable rules for acceptance and rejection of tour programs submitted for publication in its Manual, is in conflict with the applicable decisions of this Court.

2. Whether the decision of the Court of Appeals, determining on examination of the fully-developed record that "the facts in this case do not present a violation of the Sherman Act" and ordering dismissal, violates McQuade's Seventh Amendment rights.

Statement

1. *Background.*

Respondents, the Consolidated Air Tour Manual Committee and its air carrier members ("CATM") respectfully refer the Court to the statement of facts by the Court of Appeals (Pet. 2a-7a).[1]

Petitioner, E. A. McQuade Tours, Inc. ("McQuade") has participated in the Consolidated Air Tour Manual ("the Manual") since its origin in 1961. (JA[2] 93, 705; Pet. 5a). As of the time of trial, March 1971, McQuade had submitted over 2,000 tour programs for publication in the Manual. All but the twelve programs involved in the instant case, including all programs submitted by McQuade subsequent to the Summer 1968 Manual, were approved by CATM and published. (JA 201-02; Pet. 5a).

For the Summer 1968 Manual, McQuade submitted programs for 191 hotels including eleven Miami Beach hotels (JA 132-33, 1354-72). McQuade's Miami Beach programs, along with Miami Beach programs submitted by eight other tour operators, were accepted by CATM on condition that the operators furnish express written authorizations to represent the hotels in the Manual. The other eight operators provided the requested proofs of authorization. McQuade did not, and eleven of his programs ultimately were omitted from the Miami Beach section of that one issue of the Manual because of that failure to furnish the specific authorizations required by the CATM rules of which McQuade had been notified and repeatedly reminded. (Pet. 7a; JA 124-25, 819, 882-96, 929, 1314-53).

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[1] "Pet." refers to the Petition for a Writ of Certiorari filed herein by E. A. McQuade Tours, Inc.

[2] "JA" refers to the joint appendix filed in the Court of Appeals.

2. *Proceedings at the District Court.*

At trial, CATM argued that its actions in not publishing several McQuade tours were immune from the antitrust laws since the Civil Aeronautics Board had approved publication of the Manual and CATM rules adopted and implemented to accomplish that end were beyond the reach of antitrust prohibitions by reason of Section 414 of the Federal Aviation Act, 49 U.S.C. §1384. CATM also argued that its rules and actions were reasonable and wholly lawful under the rule of reason. The district court, however, concluded that CATM had engaged in a per se violation of the antitrust laws (Ja 1111-12) and charged the jury (JA 1120-21, 1205-07) that it could find for CATM only if it found both that the rules adopted by CATM were "necessary" (and thus immunized under the Federal Aviation Act) and that the rules were fairly applied to McQuade.

3. *Decision of the Court of Appeals.*

CATM argued to the Court of Appeals that McQuade lacked standing to sue under Section 4 of the Clayton Act as it had not been injured in its business or property, pointing out that the suit was based on a non-existent "right" to represent the Miami Beach hotels in the Manual. The Court of Appeals, after quoting from the record (Pet. 9a), noted (Pet. 10a):

> . . . [N]o right of representation in the Manual was referred to in McQuade's letters. Moreover, its tour operator agreements with the eleven hotels were silent concerning his right to represent them in the Manual, and management personnel of each of the hotels testified that the contracts with McQuade were in no sense intended to grant it such rights.

The court then stated that the tour operator agreements presented to CATM by McQuade "cannot reasonably be con-

strued as giving McQuade the right to represent the hotels in the Manual" (Pet. 22a). The court concluded, however, that because "McQuade was in business as a tour operator" (Pet. 12a), McQuade "thus has standing to assert whatever rights it might have under the antitrust laws" (Pet. 13a).

The court then considered "whether, and to what extent, McQuade has any rights under the antitrust laws." (Pet. 13a). The court discussed the per se rule at length (Pet. 15a-19a) and concluded that it should not be applied to this case in the total absence of the "touchstone" of the per se cases, – "exclusionary and coercive conduct" which may be viewed as a " 'naked restraint of trade.' " (Pet. 18a-20a).

The Court of Appeals perused the fully-developed record and considered whether, under the circumstances, the exclusion of the twelve McQuade programs "was an unreasonable restraint of trade." (Pet. 20a). The court concluded that any injury suffered by McQuade with respect to the 1965 incident was not attributable to CATM. (Pet. 20a). As to the 1968 incident, the court concluded that CATM rules requiring tour operators to submit proof that they were authorized to represent a hotel in the Manual were "reasonable on their face." (Pet. 20a-21a). The court found the rules served CATM's legitimate business objective of publishing a manual with the carriers' imprimaturs which would attract responsible operators and could be relied upon by the public. (Pet. 20a-21a).

The court further concluded that the rules were not applied to McQuade arbitrarily or discriminatorily, that McQuade's competitors were required to comply, and did comply, with the rules and that "there is undisputed evidence that the rules could be complied with easily and quickly." (Pet. 21a).

The court noted,[3] that it did not reach several of CATM's contentions. The court ruled "that the facts in this case do not present a violation of the Sherman Act by CATM" (Pet. 22a) and reversed with directions to dismiss.

Argument

I.

THE DECISION OF THE COURT OF APPEALS, APPLYING THE RULE OF REASON TO THE FULLY-DEVELOPED RECORD AND DETERMINING THAT CATM MAY ADOPT AND ENFORCE ON A NONDISCRIMINATORY BASIS REASONABLE RULES FOR ACCEPTANCE AND REJECTION OF TOUR PROGRAMS SUBMITTED FOR PUBLICATION IN ITS MANUAL, IS NOT IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A writ of certiorari is sought in this case on the ground that the decision below is in conflict with the applicable decisions of this Court. It is submitted that the decision of the Court of Appeals, applying the rule of reason and finding the per se rule inapplicable to the specific, sui generis situation here involved, is consistent with the applicable decisions of this Court, and the writ should be denied.

McQuade claims (Pet. 10-11) that the decision below is in conflict with *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Those decisions are not applicable.

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[3] "Owing to our disposition of this appeal, we do not reach the issue of antitrust immunity, nor do we reach a second contention by CATM, that McQuade's claims fall within the primary jurisdiction of the Civil Aeronautics Board." (Pet. 14a, n.7). In addition, the court did not reach CATM's contention that McQuade's damage evidence was grossly insufficient and should not have been submitted to the jury.

Preliminarily, it should be noted that the court below did not, as McQuade claims (Pet. 10), find "a collective refusal to deal which adversely affected competition." The court did not find that "competition" had been adversely affected. The court did note McQuade's "deceptively simple" (Pet. 16a) argument of a collective refusal to deal, but stated: "While we agree with McQuade that the airlines collectively refused to deal with it, we do not agree that CATM's conduct is to be governed by the *per se* rule." (Pet. 16a). The CATM carriers "collectively refused to deal" with McQuade only in the sense that any CATM determination was a "collective" decision of the carriers and only in the sense that failure to publish 12 of McQuade's 2000-plus tour programs was a "refusal to deal." It is also true, however, that this "collective refusal to deal," as are many,[4] was not per se violative of the antitrust laws, as the Court of Appeals properly held.

The Court of Appeals considered the cases cited by McQuade and properly distinguished them from the

---

[4] In analyzing collective refusals to deal, it is necessary to distinguish between refusals by economically productive groups such as CATM, or joint ventures, and concerted actions by groups organized for other purposes. *See* Note, 71 HARV. L. REV. 1531, 1536 (1958). For this purpose, a joint venture may be defined as (*id.*) "a group which undertakes an economically productive activity in concert . . . in order to eliminate the economic waste involved in duplication of efforts." In its order approving the formation of CATM (JA 1284), the CAB noted that one of CATM's primary purposes was to "lower production and distribution costs to carriers and tour operators."

The courts recognize the propriety of the establishment by economically productive groups of reasonable rules to exclude "applicants" or to govern the business practices of member-competitors. *See, e.g.*, Board of Trade v. United States, 246 U. S. 231 (1918); Florists Nationwide Telephone Delivery Network v. Florists Telegram Delivery Assn., 371 F.2d 263 (7th Cir. 1967); Deesen v. PGA, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U. S. 846 (1966); Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U. S. 817 (1952).

present case. (Pet. 16a-18a). The court analyzed the per se collective refusal to deal cases and found they "fall into roughly three categories." (Pet. 16a). *Silver* v. *New York Stock Exchange*, noted the court, falls within that class of cases which

> involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. (Pet. 16a).

Silver involved an absolute, unqualified and unexplained ban on certain dealings with an outsider who was a direct competitor of those effectuating the ban, – a collective determination which was described by this Court, moreover, as occurring "under totally unjustifiable circumstances."[5] 373 U.S. at 361.

The Court of Appeals also considered *Klor's Inc.* v. *Broadway-Hale Stores, Inc.* and *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, stating that they are illustrative of a second category of group boycott cases where the per se rule has been applied – those

> involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some member of the combination. (Pet. 17a).

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[5] In *Silver*, this Court stated that "*absent* any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act." 373 U.S. at 348-49 (emphasis added). This Court thus considered the collective refusal to deal with Silver by his direct competitors, and found it to be without any explanation and "under totally unjustifiable circumstances." 373 U.S. at 361. In the present case, no competitors of McQuade were involved in CATM's decision not to publish several of McQuade's submitted programs. There was no CATM "ban" on dealing with McQuade. CATM accepted and rejected McQuade tours on the basis of the same reasonable rules as it accepted and rejected tours offered by McQuade's competitors. McQuade was aware of CATM's rules and was given numerous opportunities to comply. Unlike the action in *Silver*, CATM's action was totally justified, explainable and reasonable.

Illustrative of the third category of group boycott cases where the per se rule has been applied is *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941). That group of cases, the court said (Pet. 17a), concerns "combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors." In *Fashion Originators Guild*, this Court noted that coercion designed to eliminate a rival method of competition precluded application of the rule of reason.

After reviewing those per se cases and others, the court below stated:

> In all of these cases, the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as "naked restraints of trade," and have fallen victim to the *per se* rule. On the other hand, where these elements have been missing, the *per se* rule has not been applied to collective refusals to deal. (Pet. 18a).

Analyzing the record, the Court of Appeals found it "barren" of the "exclusionary or coercive elements necessary for invoking the *per se* rule." (Pet. 19a). Further, the Court of Appeals noted that: McQuade "neither alleged nor proved that CATM's conduct was motivated by a desire to exclude McQuade from the wholesale tour market"; "neither CATM nor its member airlines are in direct competition with McQuade"; "no proof was offered to indicate that CATM or the airlines were monopolizing or attempting to monopolize" the wholesale tour market; there is not the "slightest hint that the refusal to list McQuade's tours was an attempt to somehow influence McQuade's business practices and thereby achieve some anticompetitive goal of CATM"; there "is no suggestion anywhere in the record that

CATM combined or conspired with McQuade's natural competitive enemies, the other tour operators, to deprive McQuade of a vital listing in the Manual"; and "there is nothing to suggest that CATM applied its standards to McQuade in a discriminatory fashion." (Pet. 19a-20a).

In *Maple Flooring Mfgs. Ass'n* v. *United States*, 268 U.S. 563, 579 (1925), this Court cautioned that

> . . . it should be remembered that this court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new cases to which the rule of earlier decisions is to be applied.

In accordance with this Court's *Maple Flooring* guideline, the court below refused blindly to apply per se principles pronounced in cases basically dissimilar to the present case. Rather, the Court of Appeals carefully analyzed the record, recited the elements lacking in this case which are present in per se cases, and properly applied the rule of reason, just as this Court does when faced with an antitrust case dis-

similar to those it has considered before.[6] *See, e.g., United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 373-74 (1967); *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963); and *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953).

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[6]Petitioner's statement (Pet. 11) that "[t]here is no precedent in this Court or in any court of appeals, for use of the rule of reason to test such a restraint of trade" cannot go uncorrected. Practices which have been singled out for per se condemnation in some cases have been held lawful under the antitrust laws in other cases involving different circumstances. For example, the courts, including this Court, have recognized that specific situations may justify disregard of the per se presumption in proceedings involving collective refusals to deal. *See, e.g.*, Silver v. New York Stock Exch., 373 U. S. 341, 360 (1963); Elder-Beerman Stores v. Federated Dept. Stores, 459 F.2d 138 (6th Cir. 1972); Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir.), *cert. denied*, 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972); Cartrade, Inc. v. Ford Dealers Adv. Ass'n., 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U. S. 997 (1972); Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U. S. 940 (1971); Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062 (1970); Deesen v. PGA, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U. S. 846 (1966); and Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co., 195 F.2d 86 (7th Cir.), *cert. denied*, 344 U. S. 816 (1952).

This Court also has recognized the inapplicability of per se presumptions to specific situations involving: vertical territorial limitations, *see* White Motor Co. v. United States, 372 U. S. 253 (1963); tying arrangements, *see, e.g.*, Times-Picayune Pub. Co. v. United States, 345 U. S. 594, 605-10 (1953); monopoly power, *see* United States v. E. I. duPont de Nemours & Co., 351 U. S. 377 (1956); and even price stabilization, *see* Board of Trade v. United States, 246 U. S. 231 (1918); Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933); and Cement Mfgs. Protective Ass'n. v. United States, 268 U. S. 588 (1925).

II.

THE DECISION OF THE COURT OF APPEALS, DETERMINING ON EXAMINATION OF THE FULLY-DEVELOPED RECORD THAT "THE FACTS OF THIS CASE DO NOT PRESENT A VIOLATION OF THE SHERMAN ACT" AND ORDERING DISMISSAL, DID NOT VIOLATE THE SEVENTH AMENDMENT.

The Court of Appeals properly reviewed the evidence which was submitted to the jury below and found that judgment should be entered for CATM. McQuade's contention (Pet. 14) that it was thus deprived of its Seventh Amendment right to a jury trial is totally without merit.

The doctrine of *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364 (1913), relied on by McQuade (Pet. 15), has long since been modified by decisions of this Court and Rule 50(b), FED. R. CIV. P. Mr. Chief Justice Hughes, dissenting in *Slocum*, foretold the proper interpretation of the Seventh Amendment right to a jury trial. In commenting on the action of a court of appeals in reversing, with directions to dismiss, a district court judgment pursuant to a jury verdict for plaintiff, he stated (228 U.S. at 428):

> There has been no invasion of the province of the jury. That conclusively appears from the fact that this court holds that there was no basis for finding by the jury in favor of the plaintiff. We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record.

Slocum was expressly modified by *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935), wherein this Court found that a judgment of reversal for error in denying motions for directed verdict and judgment notwithstanding the verdict should embody a direction for dismissal

on the merits and not for a new trial. It found that such a judgment of dismissal would properly be equivalent to a judgment for the defendant on a verdict directed in his favor.

Thereafter, this Court, in *Johnson* v. *New York, N.H. & H. R.R.*, 344 U.S. 486 (1952), further indicated that an appellate court on reversal could enter a judgment notwithstanding the verdict pursuant to FED. R. CIV. P. 50(b) provided that a timely motion for judgment notwithstanding the verdict had been made in the trial court. In the case at bar, such timely motion was made by CATM and denied by the trial court (JA 1242-43, 1446-48).

This Court itself has directed a district court to enter a judgment for a defendant notwithstanding a jury verdict and judgment for the plaintiff. *New York, N.H. & H. R.R.* v. *Henagan*, 364 U.S. 441 (1960). *Accord, United States* v. *Generes*, 405 U.S. 93 (1972).

The question raised by McQuade (Pet. 14) has been squarely met in *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967), where certiorari was granted to consider whether a court of appeals could, consistent with the 1963 amendments to Rule 50 of the Federal Rules of Civil Procedure and consistent with the Seventh Amendment's guarantee of the right to jury trial, direct a trial court to dismiss an action after a jury verdict for plaintiff. This Court stated that there is no Constitutional bar to an appellate court's granting judgment notwithstanding the verdict and further found that Federal Rule of Civil Procedure 50(c) and (d) do not affect the propriety of such action. The status of the law at the time of the *Neely* decision was illustrated by the Court's citation (386 U.S. at 326) of decisions from all the ten courts of appeal involving reversal of a trial court's denial of a motion for judgment n.o.v. and directing the trial court to enter a judgment for defendant.

The Court of Appeals action in the case at bar is entirely consistent with the decisions of this Court. Timely motion for a judgment n.o.v. was made below and denied. On a careful review of the evidence, the Court of Appeals concluded that no violation of the Sherman Act had been proved and directed the district court to enter a judgment of dismissal (Pet. 22a), thus, in effect, finding that the motion for judgment n.o.v. should have been granted.

In answer to McQuade's suggestion that the Sherman Act restricts application of the *Neely* doctrine (Pet. 14-15), the Ninth Circuit took precisely the same action in *Joseph E. Seagrams & Sons* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), as the Fifth Circuit did in the case at bar. The Ninth Circuit reviewed a judgment pursuant to a jury verdict under Section 1 of the Sherman Act, found that the evidence was insufficient to make out a violation, reversed, and directed that the district court enter a judgment dismissing the action. Thereafter certiorari was denied.

The second question presented by McQuade is:

> May the Court of Appeals determine questions of fact in a case where the plaintiff has the right to a jury trial –
>
> (a) By reexamining the jury's decision as to the reasonableness of a collective refusal to deal?
>
> (b) By itself determining that a restraint of trade was reasonable, and not arbitrary or discriminatory? (Pet. 2).

Clearly this statement of the question presented does not fairly comprise a request that this Court review the factual conclusions of the Court of Appeals. This Court's Rule 23 provides that the statement of a question presented in a petition for writ of certiorari will be deemed to include every

subsidiary question fairly comprised therein, and further, that only the questions set forth in the petition or fairly comprised therein will be considered by the Court. *See also* Supreme Court Rule 40(1)(d)(2). Notwithstanding its narrow statement of the second question presented, McQuade embarks (Pet. 15-17) on a review of the Fifth Circuit's analysis of the record below. Having failed properly to present the question of the propriety of the conclusions reached by the lower court, this portion of McQuade's petition should not now be considered by this Court. *See Neely* v. *Eby Construction Co., supra* at 330, and *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428-29 (1964).

A further ground for summary disposition of McQuade's argument concerning the facts is presented by *United States* v. *Johnson*, 268 U.S. 220, 227 (1925), wherein Justice Holmes, speaking for a unanimous Court, stated: "We do not grant a certiorari to review evidence and discuss specific facts." *See also* the dissents of Justice Frankfurter in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959), and *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 520 (1957).[7]

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[7]Regardless of the impropriety of McQuade's seeking a review of evidence by this Court, McQuade's misstatements should not be allowed to stand unchallenged.

McQuade states that the Court of Appeals gave no consideration to the alternative that the rules were "'applied in an unreasonable or arbitrary manner to the plaintiff's request for tour program'". (Pet. 15). Yet, in its own Petition, McQuade states that "the Court of Appeals made its own determinations . . . whether CATM's actions were arbitrary or discriminatory against McQuade" (Pet. 16) and that the court "opined that the rules were not applied to McQuade 'arbitrarily or discriminatorily'" (Pet. 16-17).

Actually, the Court considered the matter in detail and concluded:

> Nor were the rules applied to McQuade arbitrarily or discriminatorily. All interested tour operators, including McQuade, were on notice of the rules. The Miami Beach programs of eight other

operators were accepted, just as McQuade's were, on the condition that they provide proof of authority from the hotels. The other operators furnished express authorization; McQuade did not, choosing to rely on its tour operator agreement, which cannot reasonably be construed as giving McQuade the right to represent the hotels in the Manual. (Pet. 21a-22a).

McQuade suggests (Pet. 16, n.9) that the fact that CATM advised other tour operators by telegram concerning the necessity of submission of proper authorizations and failed to provide McQuade with such a telegram constitutes evidence of arbitrary application of the rules to McQuade. McQuade fails to mention the undisputed testimony that a representative of CATM repeatedly advised McQuade by telephone as to the insufficiency of McQuade's authorizations and the due dates of same. (JA 259, 892-93, 896-57, 902). Finally, McQuade was given a deadline of February 19, 1968, to submit authorizations although all McQuade's competing tour operators complied with the earlier deadline of February 9, 1968, assigned to them. (JA 904-05).

McQuade represents to this Court that the "Court of Appeals did not reexamine the record" (Pet. 15), in the face of such references by the court as "[t]he facts are important to our disposition of this appeal, so we must state them in some detail" (Pet. 2a), "there is no suggestion anywhere in the record" (Pet. 19a), "all the evidence points to the conclusion", (Pet. 20a), "there was undisputed evidence," (Pet. 21a), and "[t]here is not the slightest suggestion" (Pet. 21a).

McQuade takes issue with the Fifth Circuit's view of the Ft. Lauderdale-Sheraton situation and suggests (Pet. 16) that the telegram of the Ft. Lauderdale-Sheraton could reasonably be interpreted to support McQuade's position. The Court of Appeals stated (Pet. 20a):

> All the evidence points to the conclusion that CATM would have accepted either McQuade or American Express, leaving the choice entirely up to the Sheraton. As to the 1965 incident, therefore, any injury that McQuade might have suffered was attributable to the Sheraton, not CATM.

McQuade suggests that the Court of Appeals never considered whether the rules were necessary. (Pet. 16). In fact, the Court of Appeals not only concluded that the rules were "reasonable on their face" (Pet. 21a) but that

> ...there was undisputed evidence that responsible tour operators would not seek listing in the Manual without some assurance that other operators listed were themselves responsible; and failure to attract responsible operators would have doomed efforts to publish

the Manual. Finally, since several operators would be submitting programs for the same hotel, considerations of administrative convenience *required* proof that the operators were in fact authorized to represent a hotel in the Manual. (Pet. 21a, emphasis added).

Finally, McQuade suggests (Pet. 17) that the Court of Appeals never considered the reasonableness of excluding McQuade's Miami Beach program because of the defects in the alleged authorizations of the hotels. The Court of Appeals stated clearly that McQuade's authorizations could not reasonably be construed as giving McQuade the right to represent the hotels in the Manual. (Pet. 22a). In sum, it is entirely inappropriate for McQuade to suggest that the Court of Appeals did not carefully examine the record below when its opinion concluded as follows: "Thus, we hold that the facts in this case do not present a violation of the Sherman Act by CATM." (Pet. 22a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-706

E.A. McQUADE TOURS, INC.,
Petitioner,

v.

CONSOLIDATED AIR TOUR MANUAL COMMITTEE, *et al.*,
Respondents.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

Petitioner, E.A. McQuade Tours, Inc. (McQuade), submits this reply to the brief for respondents (CATM) pursuant to Rule 24(4) of this Court.

ARGUMENT

A COLLECTIVE REFUSAL TO DEAL, ADVERSELY AFFECTING COMPETITION, IS A *PER SE* VIOLATION OF THE SHERMAN ACT

In response to the argument at page 6 of CATM's brief that the Court of Appeals did not find that "competition" had been adversely affected by CATM's collective refusal to deal with McQuade, this Court is respectfully referred to the decision below. The Court of Appeals recognized that McQuade could not effectively compete in the sale of tour programs if such programs were not published in the Manual (Pet.,[1] pp. 10a, 12a, 16a). The exclusion of McQuade's programs adversely affected competition in the sale of such programs.

CATM does acknowledge a collective refusal to deal with McQuade, in the exclusion of McQuade's programs from the Manual in 1965 and in 1968, but claims that this should not be considered a *per se* violation of the antitrust laws since CATM is an "economically productive group".[2] The cases cited by CATM involve applicants seeking to join such groups, or members of such groups adversely affected by the group's rules, and are inapposite here, where McQuade did not seek to join CATM, but to pay for and advertise in the Manual (Pet., pp. 11-12).

---

[1] Pet. refers to McQuade's Petition for a Writ of Certiorari.

[2] CATM's brief, p. 6, fn. 4. CATM made this same argument to the Court of Appeals, which apparently rejected it, *sub silentio*. In any event, this Court has applied the *per se* rule to group boycotts by economically productive groups. *See, e.g., Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963), *rehearing denied* 375 U.S. 870. *See, also, Ricci v. Chicago Mercantile Exchange*, 447 F.2d 713 (7th Cir. 1971), *certiorari granted* 31 L.Ed.2d 230 (1972), argued Oct. 18, 1972.

CATM has also taken issue with petitioner's statement: "There is no precedent, in this Court or in any court of appeals, for use of the rule of reason to test such a restraint of trade", referring to a "collective refusal to deal which adversely affected competition." (Pet., pp. 10-11). Petitioner reasserts this statement, which is not contradicted by the cases cited by CATM at page 10 of its brief.[3]

[3] In *Silver v. New York Stock Exchange, supra,* this Court did not employ the rule of reason test, but found the group boycott to be a *per se* violation. *Elder-Beerman Stores v. Federated Department Stores,* 459 F.2d 138 (6th Cir. 1972), involved exclusive representation arrangements (*See,* Pet., p. 11), and there was no proof of a conspiracy. In *Lamb Enterprises, Inc. v. Toledo Blade Co.,* 461 F.2d 506 (6th Cir. 1972), *certiorari denied* 41 U.S.L.W. 3254 (Nov. 6, 1972), there was substantial evidence in support of the jury's finding that there was not a conspiracy. *Cartrade, Inc. v. Ford Dealers Adv. Ass'n,* 446 F.2d 289 (9th Cir. 1971), *certiorari denied* 405 U.S. 997 (1972), concerned an exclusive contract arrangement and not a boycott case (Pet., p. 11), and no appreciable effect on interstate commerce. In *Bridge Corp. of America v. American Contract Bridge League,* 428 F.2d 1365 (9th Cir. 1970), *certiorari denied* 401 U.S. 940 (1971), there was not a group boycott or evidence to demonstrate a refusal to deal. *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969), *certiorari denied* 396 U.S. 1062 (1970), did not involve a conspiracy, but an exclusive franchise arrangement (Pet., p. 11). In *Deesen v. Professional Golfers Ass'n.,* 358 F.2d 165 (9th Cir. 1966), *certiorari denied* 385 U.S. 846 (1966), there was not a conspiracy or combination to monopolize, the case involving an applicant for membership in a group. (Pet., pp. 11-12; CATM brief, p. 6, fn. 4). In *Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co.,* 195 F.2d 86 (7th Cir. 1952), *certiorari denied* 344 U.S. 816 (1952), refusal to sell insurance to a "poor risk" did not bring defendants within the ban of the Sherman Act.

It should be further noted that in *White Motor Co. v. United States,* 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963), the *per se* test was applied to price fixing, and use of the *per se* rule for territorial limitations was not disavowed when the case was

[continued]

THE SEVENTH AMENDMENT PROSCRIBES REEXAMINATION OF A JURY'S DETERMINATIONS OF FACT AND THE ASSUMPTION OF THE FACT-FINDING ROLE BY THE COURT OF APPEALS

Lest CATM's contentions obfuscate petitioner's second question, petitioner must respond to the argument at pages 11-16 of CATM's brief.[4]

Petitioner's second question is not a request that this Court review the findings of fact by the court below. Petitioner seeks review of the violation of its Seventh Amendment rights. The Court of Appeals failed to consider that the jury's verdict may have been based on its finding that the rules were "applied in an unreasonable or arbitrary manner to the plaintiff's requests for tour program . . ." (Pet., pp. 8, 10, 15-17). Rather, the Court of Appeals improperly reexamined and redetermined the facts considered by the jury. The court below further erred by arrogating to itself issues of fact which are the province of the jury.[5]

[continued]
remanded for trial. In *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953), this Court stated that the *per se* rule was used in tying arrangements, but found that tying was not present.

[4]Petitioner does not here question the authority of a court of appeals to reverse a district court's denial of a motion for judgment notwithstanding the verdict, but does question the relevance of this argument where CATM did not appeal the denial of the motion for a judgment n.o.v., and where the court below did not find that said motion should have been granted. Unlike *Neely v. Eby Construction Co.,* 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), the court below did not find the evidence to be insufficient to support the verdict.

[5]CATM's argument in footnote 7, pages 14-16 of respondents' brief, further demonstrates that these disputed questions of fact should have been left to the jury's determination.

These matters are encompassed by petitioner's second question (Pet., p. 2), and certiorari should be granted to review these actions by the court below, which are in violation of petitioner's rights and in conflict with this Court's decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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